Petition

81-1013

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NO : _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CLIFFORD JOHNSON,
Petitioner,
v.
THE SUPREME COURT OF THE STATE OF CALIFORNIA, THE SUPERIOR COURT OF CALIFORNIA FOR SAN FRANCISCO COUNTY, THE BANK OF AMERICA, DAVID SHEPPARD, AND DONALD HAWKINS,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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Petitioner in Pro Per

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES :

Petitioner Clifford Johnson prays that a writ of certiorari issue to review the judgement of the California Supreme Court entered on September 2, 1981.

QUESTIONS PRESENTED

1. Whether principles of public policy and/or due process provisions of the Fifth Amendment may entitle a discharged employee to maintain a wrongful discharge tort action when the employee alleges the discharge resulted from a refusal to comply with orders manifestly and substantially : (i) injurious to the public; or (ii) in violation of a Federal statute; or (iii) contrary to professional ethics.

2. Whether the freedom of expression provisions of the First Amendment guarantee the right of employees to reasonably express through proper lines of communication their honest professional opinions concerning assigned job responsibilities; and whether, when said responsibilities place an employee in a position of public trust, or are otherwise of substantial public concern, discharge for such expression constitutes tortious discharge.

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Columbia Law Review 67 1404 (1967), "Employment at Will : On Limiting the Abusive Exercise of Employer Power" 13,19-20

Comptroller General (1977) "Federal Supervision of State and National Banks" 10,16,17

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OPINIONS BELOW

The opinions of the California Supreme Court, of the First Appellate District Division of the California Appeal Court, and of the California Superior Court for San Francisco County, comprise Appendices A, B, and C respectively herewith. The reporter's transcript of a hearing before the California Superior Court for San Francisco County comprises Appendix D.

JURISDICTION

The judgement of the Supreme Court of California was entered on September 2, 1981. The jurisdiction of this court is invoked under 28 USC § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The case involves the First and Fifth Amendments to the Constitution of the United States, which provide :

> Congress shall make no law respecting an establisment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> No person shall be ... ;
> nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, limb, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The case also involves 12 USC § 1818, a voluminous statute regulating against dishonest, unsound, unsafe, or other improper business practices in Banks. Its application herein is adequately summarised citing the Comptroller General (pages 16 and 17).

STATEMENT OF THE CASE

On February 19, 1981, Petitioner filed his Second Amended Complaint in the California Superior Court for San Francisco County. The facts alleged in the second cause of action embrace all of the grounds for a wrongful discharge tort contained in the questions presented, stating that : Petitioner, despite exemplary performance ratings, was discharged in disgrace from employment at the Bank of America because he refused, in technical communications which it was his assigned responsibility to generate, to falsify and conceal findings of unsound and unsafe practices in data processing operations which violated 12 USC § 1818, jeopardized the security of depositors' money, and caused financial losses in the order of $25 million.

At a hearing on April 24, 1981, the Honorable Ira A. Brown, Jr., sustained without leave to amend a Demurrer to this cause of action on the grounds that it failed to allege sufficient facts. In so ruling, the court nevertheless recognized the issues raised were ripe for appellate resolution :

> THE COURT: Mr. Sigerman, I simply do not think Tammany [sic] goes that far. Now, I can be wrong, and you have a good record if you want to take it up, but I don't think Tammany [sic] goes that far. (See top of page 30.)

Accordingly, a Petition for a writ of mandate to compel re-instatement of Petitioner's second cause of action was filed in the First Appellate District Division of the California Appeal Court. Though opposition papers were requested, said Petition was denied without a hearing.

In both the California Superior and Appeal courts, Defendants' argument for said Demurrer was the failure of Petitioner to allege violations of penal, as opposed to civil, statutory violations. It was not contested that Petitioner had alleged facts and arguments equivalent to the questions presented herein, which were judged insufficient.

A Petition for Hearing was then filed in the California Supreme Court, again having the objective of re-instating Petitioner's second cause of action. This Petition was denied by an order entered on September 2, 1981; but the Honorable Rose Bird, Chief Justice of the California Supreme Court, took the trouble to state upon the order :

> Bird, C.J., is of the opinion that the petition should be granted.

Wherefore Petitioner, finally denied by the California Supreme Court his right to procede to trial on his second cause of action, which right is claimed under principles of public policy and Constitutional provisions for due process and freedom of expression, petitions herein for a writ of certiorari to restore said right.

The fact that issues deriving from Petitioner's other causes of action are still pending in California courts does not frustrate the requirement of finality

regarding certiorari, since Petitioner's second cause of action is, as required by California law, separate from all other causes of action, and since this court has upheld the applicability of certiorari to such separable issues (e.g. see **Mills v. Alabama** (1966); **Hudson Distributors Inc. v. Eli Lilly & Co.** (1964)).

ARGUMENT FOR WRIT

I. CONFLICT IN THE LOWER COURTS

United States courts have long upheld the common-law rule that a private-sector employer can discharge at will and without legal liability any employee hired for an unspecified term, irrespective of the employer's reason or motivation. The only consistently recognized exceptions to said rule are some express statutes prohibiting discharges due to class discrimination, or due to collective bargaining or other concerted activities such as complaints about occupational health or safety. Recently, however, some courts have sanctioned less explicit exceptions to the "discharge-at-will" rule, and have allowed discharged employees to maintain wrongful discharge causes of action sounding in tort against a private employer when it is alleged that the discharge was effected in violation of "public policy". The California Supreme Court sanctioned this cause of action in **Tameny v. Atlantic Richfield** (1980) :

> ... when an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions. (**Tameny**, at p. 170)

Note that the characterization of the Tameny tort as being restricted to cases involving criminal activity is in error. Indeed, the court relied heavily upon Petermann v. International Brotherhood of Teamsters (1959), a case in which public policy was carefully defined as follows :

> By public policy is intended that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. ... whatever contravenes good morals or any established interests of society is up against public policy.
> (Petermann at p. 188)

In this context the ruling that Petitioner has failed to allege sufficient facts to support a Tameny cause of action is inexplicable, especially upon on the specific grounds that criminal allegations are needed to support such a cause of action.

Though the Tameny court cited a wealth of caselaw in framing the public policy wrongful discharge tort, a controversy has arisen regarding the questions herein :

> By far the most controversial of the newly created public policies in wrongful discharge cases is the public policy favoring an employee's public protest of and/or refusal to work in furtherance of business activities deemed improper or unlawful by the employee.
> (Olsen, Labor Law Journal (1981) p. 275)

In this uncertain situation, an open, and as yet unresolved, speculation was formulated by the California Appeal Court in Pugh v. SEE's Candy (1981) :

> It may be that there is a public policy which favors protection of employees against dismissal for voicing concerns, within an enterprise, concerning the legality or morality of enterprise conduct.
>
> (Pugh, fnt. 14, p.324)

Even within the California Supreme Court there exist differing opinions on the merits of Petitioner's "public policy" wrongful discharge cause of action, as is evident from the dissenting opinion of the Chief Justice the Honorable Rose Bird.

Although the California Supreme Court in the instant case evidently sustained the ruling that criminal allegations are necessary in a "public policy" discharge tort, other State Supreme Courts have judged that civil statutory violations are adequate to support this cause of action. For example, the New Jersey Supreme Court in Pierce v. Ortho Pharmaceutical Co. (1978) sanctioned this tort where it was alleged that the employee was discharged for refusing to violate regulations which protected consumers. The West Virginia Supreme Court ruled likewise in Harless v. First National Bank (1978); and further instances could be cited.

The issue of a "public policy" tort action for wrongful discharge, though of importance, has yet to be ruled on by the United States Supreme Court. This Petition should be granted because it presents questions which are issues of conflict in the lower courts, and because review is sought regarding a State Supreme Court judgement in conflict with decisions of other State courts of last resort.

II. IMPORTANT FEDERAL ISSUES RAISED

1. PUBLIC IMPORTANCE OF ISSUES

The Bureau of the Census (1980) records that almost 65% of all American Employees are hired on an at-will basis. The conditions under which an employee may be discharged without legal liability are a cornerstone of an employment arrangement, and therefore the issues before this court directly concern the livelihoods of well over half the working population in terms of job security, career growth, and Constitutional rights, thereby influencing the morality and productivity of private enterprise, and ultimately affecting the social and economic welfare of the nation.

Further, the very validity of a broad class of Federal statutes, enacted to protect the public, is brought into grave doubt by the ruling that Petitioner's second cause of action failed to allege facts sufficient to support a wrongful discharge tort. This point is more fully argued below, but it is proper to note here that this particular issue gives Petitioner the right of direct appeal to this court, in that the validity of the Federal statute 12 USC § 1818 is drawn into question. Whether Federal statutes, intended to regulate employees whose jobs place them in positions of public trust, have a sphere of application protecting said employees from being discharged for obeying them, is a question regarding the scope of said statutes, and therefore should be ruled upon by this court.

Further, the pervasive spread of data processing technologies into all realms of human enterprise is an influence changing the face of society. (In the last year

more new computers were announced than in all previous history.) The regulation of this new technology, and especially the firm application of standards of safety and soundness, is therefore of vital and immediate public importance. 12 USC § 1818 regulates against unsafe and unsound practices in Banks, and Petitioner alleges his discharge resulted from his refusal to cover-up unsafe and unsound practices in the field of data processing; again, the Petition is worthy of consideration due to the public importance of the issues raised.

The sections below specify and argue in detail the important Federal issues raised by this Petition.

2. FIRST QUESTION PRESENTED

A. Public Policy Issues

Questions of general public concern are properly brought before this court when framed, as required, in terms of relevant statutes and Constitutional provisions, since the application of such express law is guided by public policy considerations. Labor law is no exception:

> The personal liberty and right of property guaranteed by this amendment and Amend. 5 embrace the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor, and the enjoyment of those fundamental constitutional rights is subject always to the fundamental condition that no contract, whatever its subject matter, can be sustained which the law, on reasonable grounds, forbids as inconsistent

with the public interests, as hurtful to the public order, or as detrimental to the common good.
(Kingston Trap Rock Co. v. International Union of Operating Engineers (1941))

The above unequivocably demonstrates that Constitutional amendments are basic elements in all employment contracts, and it explains how the application of public policy considerations to such contracts is both proper and a matter of Constitutional law. Questions raised regarding public policy and the "at-will" nature of most employment contracts are therefore also questions raised regarding the interpretation of express Federal law, and are thus properly brought before this court.

Continuing, then, with public interest arguments in support of Petitioner's writ, it is noted that the right of an employer to discharge an employee at will may be over-ruled by public interest considerations. Petitioner argues that such public policy considerations apply in this particular case as follows :

Issuance of writ re-instating Petitioner's second cause of action would strengthen statutes enacted to protect the public, prompting employers to properly consider public welfare in conducting business, and encouraging employees to conscientiously perform responsibilities affecting the public. An adequate safeguard against spurious suits based on the first question presented would be the assignment to the discharged employee of the burden of proving manifest and substantial violations of public policy.

Further, said writ will tend to enhance employee responsibility and participation

in private enterprise, which in turn will tend to enhance productivity. Though, in the context of this Petition, this terse analysis may seem no more than idle speculation, in-depth research by experts can be cited to support it. It is included herein to challenge any habits of thought which incorrectly presume that moderation of the absolute authority of management in private enterprise would necessarily reduce the productivity and profitability of the private sector.

All these arguments are represented in Petitioner's second cause of action. The importance of public interests involved is stated directly by the Comptroller General (1977) at p. 5-10 :

> Banking laws and regulations are an essential element of the regulatory system. They protect depositors, customers, investors, creditors, and the public by establishing the boundaries of banking activities. Violations of laws and regulations reflect management's capability.

Regarding Bank examinations, at p. 7-20 :

> FDIC's new policy statement provides : "* * * Full use should be made of the bank's EDP[Electronic Data Processing] and management reports ..."

Also, at p. 7-21, operating efficiency was deemed so important as to justify building special regression models to evaluate it.

Petitioner's assigned job was the generation of EDP reports for management, and hence was a matter of substantial public concern. Petitioner has alleged his discharge resulted from his refusal to

misrepresent these matters, such an action being manifestly and substantially against the public interest.

Further, the ramifications re productivity are in Petitioner's case extreme. Not only is such efficiency per se of public concern, as evidenced above, but the losses estimated by Petitioner greatly exceed the official requirement for classification as "catastrophic" ($5 million). Indeed, it is common knowledge that Bank of America's operating efficiencies were damagingly poor throughout Petitioner's employment. Thus Cynthia Kasabian (1981), after noting a drop in earnings, reported at p. D-3 :

> Bank of America has yet another blemish on its books. Its operating expenses have risen steadily ... During the past five years, operating expenses have increased at a rate of about 15 percent.
> (San Francisco Examiner, April 19, 1981)

B. Due Process Issues

The following argument is in three parts. The first part identifies a need for a due process remedy to protect non-union private employees. The second part proposes a legal basis for such a remedy. The third part applies this remedy to the Petitioner's second cause of action.

The need for a due process remedy :

Existing international standards for discharge from employment are set forth by the International Labour Office (ILO) in a recommendation adopted at the 1963 Geneva conference of member nations. (The United States has been a member government

since 1934.) Pertinent sections of this Termination of Employment Recommendation, 1963, (No. 119) are as follows :

> 1. Effect may be given to this recommendation through national laws or regulations, ... or court decisions
> 2. (1) Termination of employment should not take place unless there is a valid reason for such termination connected with the capacity of the worker or based on the operational requirements of the undertaking, establishment, or service.
>
> (2) The definition or interpretation of such valid reason should be left to the methods of implementation set out in Paragraph 1.
> 3. The following, inter alia, should not constitute valid reasons for termination of employment: (a) ... (b) ... (c) the filing in good faith of a complaint or the participation in a proceeding against an employer involving alleged violation of laws or regulations; ...

In the instant case, Petitioner alleges he was dismissed for refusing to perform directions of his employer in violation of statutory regulations; and therefore, were this court to give proper effect to the above recommendation, the writ sought should issue. Further, item 2. (1) above requires the sanctioning of a wrongful discharge tort for all circumstances set forth in the questions before this court.

By 1976, this recommendation had led to legislation in over 40 countries (International Labour Office (1976), p. 21). In 1980, the ILO circulated to member governments re the 1981 Conference, Report VIII (1), entitled "Termination of Employ-

ment at the Initiative of the Employer". At p. 13, the United States was singled out for lacking legal protections against abusive discharge for private employees :

> In the United States, collectively bargained protection against dismissal without just cause is still, in private employment, the sole protection.

The need for a tort remedy protecting non-union professional employees in large corporate environments was fully expounded in the **Columbia Law Review** (1967). In **Pugh v. SEE's Candy** (1981) the California Appeal Court addressed this issue :

> The recognized inequality of bargaining power between employer and individual employee underlies the use of labor unions and the institutionalization of collective bargaining. And through collective bargaining, unions have placed limitations on the employer's unilateral rights of termination. Under most union contracts, employees can only be dismissed for 'just cause', and ... employees who either do not or (as in the case of managerial employees, such as Mr. Pugh) cannot form unions are left without that protection. ...
> And while public employees may enjoy job security through civil service rules and due process, the legal principles which give rise to these protections are not directly applicable to private industry.
> (**Pugh**, at p.320-321)

Petitioner, a professional employee, was himself barred from any union activity because he supervised one programmer. Clearly, there is a need for a tort remedy

supporting Petitioner's second cause of action. Petitioner claims the right to such a tort action under the due process provisions of the Fifth Amendment, arguing as follows :

Legal basis for due process remedy :

Petitioner had a property interest in continued employment deriving from earned benefits, from promises of career advance and due reward for excessive overtime he had worked, and from the importance of his professional reputation in terms of both job satisfactions and earning power. Such interests have been judged as constituting "property" within the scope of the due process clause of the Fifth Amendment. These properties were lost to Petitioner as the direct consequence of his being discharged on the pretext of "willfull breach of duty".

Petitioner's assigned job placed him in a position of substantial public trust, and his conduct as a Bank officer was strictly regulated by Federal statute. Thus his employment contract was not purely private, but obligated him to work in accordance with public duties expressly required by the Federal Government.

Further, he was bound to perform these duties under Federal threat of discharge. Petitioner alleges that he was discharged because he refused to perform acts cited by Federal authority as constituting full grounds for discharge from employment by Federal statute.

In instituting the Federal right to discharge Petitioner for any failure to perform public duties, the Federal courts have already determined that the public

issues concerned are of such gravity as to warrant Federal regulation of the right to terminate employment; and thus it is not an extension, but rather a completion of Federal law to allow a wrongful discharge action based on Petitioner's refusal.

Had the Petitioner obeyed his alleged orders, he should have been discharged by a Federal agency. It tends to shock the sense of fairness that Federal law would allow no recovery for wrongful discharge in such circumstances, and based on the oft-applied maxim that :

> Fair play is the essence of "due process" (Galvan v. Press (1954))

Petitioner claims his right to proceed with his wrongful discharge action on due process grounds.

This legal "theory", which is in fact little more than common-sense justice, is supported by the following analysis of the Petitioner's allegations :

Application of due process remedy :

As a Bank officer whose assigned task was to develop management reports monitoring almost all of the Bank of America's EDP operations, which concerned the flow of huge sums of money entrusted to his employer, Petitioner was in a position of public trust and under a public duty not to engage in conduct manifestly and substantially : (i) injurious to the public; or (ii) in violation of a Federal statute; or (iii) contrary to professional ethics. These duties correspond to the list contained in the first question before this court. Petitioner alleges his discharge resulted from his refusal

to perform actions contrary to these public duties, and is therefore entitled to sue for damages occassioned by the discharge. Further, Petitioner alleges his employer's conduct was in knowing and willfull disregard of injury to the public and to Petitioner, of statutory violations, and of ethical standards, and therefore warrants a tort remedy.

Arguments substantiating the above duty (i) of Petitioner are given in section 2. above; arguments substantiating the above duty (iii) of Petitioner are given in section 4. below. The rest of this section centers on the above duty (ii) of Petitioner, namely his obligation to comply with statutory regulations, in particular 12 USC § 1818.

The public duties imposed on Petitioner by the nature of his job, and the gravity of violations thereof, are elucidated by the following description of some of the powers granted to supervisory bodies by 12 USC § 1818. The enforcement of this statute through cease-and-desist orders often commences as follows :

> First, a notice of charges is served upon a Bank
> - which has engaged or is engaging in unsafe or unsound practices;
> (Comptroller General (1977), p. 8-7)

It is to be noted that in alleging deficient internal control and audit procedures, as he does in his second cause of action, Petitioner identifies practices which have previously been ruled to come under the auspices of this statute (see First Nat. Bank of Eden, S.D. v. Department of Treasury (1978)).

Further, a Bank officer, as was Petitioner, can be removed under this statute:

> Also under the Financial Institutions Supervisory Act of 1966 (12 USC 1818 (e)), FDIC and FRS may order the removal of a director or officer of a State bank which they supervise and OCC may recommend that FRS remove one from a national bank when :
> -- the director or officer has violated a law, a rule, a regulation, or a final cease-and-desist order; has participated in any unsafe or unsound banking practice, or has committed or engaged in any act, omission, or practice which constitutes a breach of his fiduciary duty; and
> -- as a result, the bank has suffered or will probably suffer substantial financial loss or other damage or the interests of depositors could be seriously prejudiced; and
> -- the violation, practice, or breach involved personal dishonesty on the part of the director or officer.
> (Comptroller General (1977), p. 8-8)

Petitioner has clearly alleged facts sufficient to show that, had he not refused to perform his employer's directions, then he would have so failed in his fiduciary duty as to warrant his removal in accord with the above standards.

A statute granting powers of discharge against one who fails to uphold it, must surely grant the right of a wrongful discharge action to one discharged because of obedience to it. Petitioner claims this right under due process provisions of the Fifth Amendment.

3. SECOND QUESTION PRESENTED

Freedom of Expression Issues

The first question presented herein, founded on Petitioner's right to due process, asserts a wrongful discharge tort when an employee alleges the discharge was caused by a refusal to perform directions manifestly and substantially up against some public policy. In such a case, the employee must prove the public policy violations were manifest and substantial.

In contrast, the second question is founded primarily on the right to freedom of expression and proposes that a wrongful discharge tort action be allowed when it is alleged the employee was discharged for expressing his honest opinions in the normal course of business activities, and when the expressions concerned substantial public interests and duties, irrespective of whether the expressions were correct or not. Adequate safeguards against abuse of such a cause of action would be : (i) were the employee in fact wrong, the employer could allege incompetence as just cause for discharge; and (ii) were the employee to express his opinions unreasonably or via abnormal communication lines, the tort would not apply; and (iii) only expression deriving from the employee's public duties would be protected.

The legal principle advanced is that in the performance of public duties, and for the benefit of the public welfare, freedom of expression is a right which weighs more heavily than an employer's right to discharge an employee at will. Though this precise question has yet to be addressed by the courts, rulings in related cases affirm the validity of the principle.

Thus, the courts have consistently upheld the right to freedom of expression in public employment because of the benefit to public welfare which results from it. (See McMahon v. Board of Selectmen of Town Newton, D.C. Conn. (1981); Clary v. Irvin, D.C. Tex (1980); Watts v. Civil Service Bd. for Columbia, Tenn. (1980).)

In the private sector, the courts have applied the right to freedom of expression to the workplace by ruling that it gave to supervisorial staff the freedom to express personal opinions, in a reasonable manner, regarding collective bargaining issues (29 USC § 158(c)).

Based on the precept that :

> Freedom of expression upon public questions is secured by this Amendment (New York Times Co. v. Sullivan (1964))

Petitioner proposes and claims an equally careful application of the right to free expression in the workplace. This right would protect only proper and internal business communications regarding public duties imposed on employees by virtue of their assigned job responsibilities. One corollary of this right is the wrongful discharge tort claimed by Petitioner who alleges his discharge resulted from such protected expression.

A speculation of the California Appeal Court regarding such a public policy cause of action is quoted on page 6 above (Pugh v. SEE's Candy (1981)). The case for a tort wrongful discharge remedy founded on freedom of expression was expounded in the Columbia Law Review article "Employment At Will vs. Individual Freedom : On Limiting

the Abusive Exercise of Employer Power" (1967), at p. 1408 :

> Another danger posed by the employer's superior power is summed up on the observation that 'the professional employee encounters many situations where his code of ethics comes in conflict with the requirements of his employer, where the tenets and ethics of his profession are pitted directly against his daily bread'. Consider, for example, the plight of an engineer who is told he will lose his job unless he falsified his data or conclusions, or unless he approves a product which does not conform to specifications or meet minimum standards.

In Pierce v. Ortho Pharmaceutical Co. (1980), the court confirmed at p. 512 :

> Employees who are professionals owe a special duty to abide not only by federal and state law, but also by the recognized codes of ethics of their professions. That duty may oblige them to decline to perform acts required by their employer.

Petitioner has alleged his discharge resulted from his refusal to misrepresent and conceal matters of substantial public concern relating directly to his assigned job resposibilities. His employer thereby violated Petitioner's right to freedom of expression as provided for by the First Amendment. The writ sought should issue.

Petitioner regrets he could not afford legal counsel in preparing this Petition, and sincerely apologises to this court for any irregularities of form. Petitioner is assured of proper representation in the event of a hearing on his Petition.

Respectfully submitted,

Dated 11/29/81

Clifford Johnson,
Petitioner in pro per.

APPENDIX A

JUDGEMENT OF THE CALIFORNIA SUPREME COURT

ORDER DENYING HEARING
AFTER JUDGEMENT BY THE COURT OF APPEAL
1st District, Division 1, Civil No. 53133

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

JOHNSON, Petitioner,

v.

THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent;

THE BANK OF AMERICA, N.T. & S.A., et al., Real Parties in Interest.

Petition for hearing DENIED.

Bird, C.J., is of the opinion that the petition should be granted.
[signed by Bird, Chief Justice]

Supreme Court
Filed
Sep 2, 1981
Laurence P. Gill, Clerk
[signed by Deputy]

APPENDIX B

JUDGEMENT OF THE CALIFORNIA APPEAL COURT

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION ONE

Clifford Johnson,
Petitioner,

vs.

The Superior Court for San Francisco
County,
Respondent,
The Bank of America, N.T. & S.A.,
David Sheppard, Donald Hawkins,
and DOES I through X,
Real Parties in Interest.

No. 1 CIV 53133

Superior Court No. 765624

BY THE COURT :
The petition for writ of mandate on
file herein is denied.

DATED AUG 10 1981 [signed Raconelli] P.J.

APPENDIX C

ORDER OF THE CALIFORNIA SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN FRANCISCO

CASE No. 765624

CLIFFORD J. JOHNSON,
Plaintiff,

vs.

THE BANK OF AMERICA, DAVID SHEPPARD, DONALD HAWKINS, and DOES I through X,
Defendants.

ORDER SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND TO THE SECOND CAUSE OF ACTION OF PLAINTIFF'S SECOND AMENDED COMPLAINT

FILED MAY 5 1981
Carl M. Olsen, Clerk.
[signed by deputy]

The Demurrer of Defendants Bank of America National Trust and Savings Association, David Sheppard, and Donald Hawkins in the above-entitled case came on regularly to be heard on April 24, 1981. Patricia K. Gillette appeared as counsel for the Defendants and Jon B. Sigerman appeared as counsel for the Plaintiff. After due consideration of the papers submitted by counsel and oral argument at the hearing, and good cause appearing therefore :

IT IS HEREBY ORDERED that the Demurrer of Defendants Bank of America National Trust and Savings Association, David Sheppard, and Donald Hawkins to the Second Cause of Action of Plaintiff's Second Amended Complaint is sustained without leave to amend on the basis that the Plaintiff has failed to state facts sufficient to constitute a cause of action.

Dated : MAY 4 1981

Signed [Ira A. Brown]
Judge of the Superior Court

APPENDIX D

TRANSCRIPT OF CALIFORNIA SUPERIOR COURT DEMURRER HEARING

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY OF SAN FRANCISCO

HONORABLE IRA A. BROWN, JR., JUDGE
DEPARTMENT NO. 9

Case No. 765624

CLIFFORD JOHNSON,
Plaintiff,

vs.

BANK OF AMERICA,
Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
OF
FRIDAY, APRIL 24, 1981

Appearances
For Plaintiff : Jon B. Sigerman
For Defendant : Ms. Patricia Gillette

Reported by : RICHARD COLVILLE, C.S.R.
Certificate No. 2675.

FRIDAY, APRIL 24, 1981 MORNING SESSION

PROCEEDINGS

THE CLERK: Line item 15, Johnson versus Bank of America.

MR. SIGERMAN: Good morning, your Honor. I'm Jon Sigerman appearing for the Plaintiff.

MS. GILLETTE: Good morning, you Honor. Patricia J. Gillette appearing for the Bank of America.

THE COURT: All right.

MS. GILLETTE: I'm the moving party. I'm more than happy with your tentative ruling.

THE COURT: Yes. Mr. Sigerman.

MR. SIGERMAN: Your Honor, I'm not -- it wasn't -- the basis expressed for the tentative ruling.

THE COURT: The basis is that the complaint fails to state facts sufficient to constitute a cause of action.

MR. SIGERMAN: Then the -- the action is under the case Tammany versus Atlantic Richfield, which essentially, as I read the case, states that an employee may not be terminated for refusing to engage in activity which contravenes public policy which is injustice to the public good. What has been alleged in the second cause of action is that plaintiff was hired to do a particular job to investigate problems in a computer system; that this system is involved in the auditing and control functions are -- in fact, the

safety and maintenance of these auditing and control functions are in fact regulated by Federal statute; that the Bank has its own manual as to what constitutes safe -- what we've designated as -- data management in respect to auditing and control functions; and that the Plaintiff in fact did his job, discovered problems, voiced these problems. His voicng these problems apparently stepped on the toes of an existing organization, created embarassment. But the fact was he did his job. He was ordered not to -- not to make these findings known, to disclose these findings, in order to sign off on certain systems specifications.

THE COURT: There is nothing illegal about what the Bank was doing, was there? They didn't ask him to do anything illegal. He simply said your computer program is rotten, they're no good, and they say we don't want to hear about that any more.

MR. SIGERMAN: It's one step further. It was alleged that the computer program, the processing which processes checks is unsafe and unsound.

THE COURT: Unsafe? Unsafe how?

MR. SIGERMAN: Unsafe in that -- and again, this is getting into the evidence that would go into trial. But unsafe in respect that missing interests, appropriate interest calculations; vulnerable to computer embezzlement; lack of safe mechanisms. And these are programs relating to depositors' accounts. And the depositors constitute a wide segment of the public.

THE COURT: Mr. Sigerman, I simply do not think Tammany goes that far. Now I can be wrong, and you have a good record if you want to take it up, but I don't think Tammany goes that far.

MR. SIGERMAN: May I point out, your Honor, in a case that subsequent -- was an opinion that was subsequently issued by the Court of Appeals, First District. (sic) In the case Pugh v. SEE's Candy, which just came out last month, that pointed out that there's -- there's two theories which govern the court of wrongful discharge. The case pointed to contract theory and pointed to the public policy theory explicitly cited in Tammany. In addressing the public policy theory, the court had -- really had to treat the same questiom we're addressing here. It's what is the scope of this public policy protection? And in this -- the court stated there's a public policy which favors protection of employees against dismissal for voicing concerns within an enterprise concerning the legality or morality of enterprise conduct. Now the question if -- if a particular department if refusing to recognize that depositors' funds are being jeopardized -- and the allegations of the complaint state, in fact, that the system is unsafe and this plaintiff has been ordered to not only suppress its findings, but to sign off on specifications which he has alleged are not correct and which go to the safety issue -- then I would assert that that comes under the morality issue. There's not -- I don't see the Tammany case as restricting the act -- illegal or criminal act. There's nothing in the case which states that. The case really states it is dealing with terminations in violation of public policy, abuse of termination -- it's suggesting that when an

employee in doing his job is ordered to commit acts which can be injurious to the public, which is one of the cases cited by Tammany, injurious to the public as opposed to illegal -- then that type of termination is what is proscribed by the public policy provisions of this case.

THE COURT: The demurrer will be sustained without leave to amend for failure to state facts sufficient to constitute a cause of action.

MS. GILLETTE: Thank you, your Honor. Is notice waived ?

MR. SIGERMAN: Yes.

MS. GILLETTE: Thank you.

THE COURT: Notice waived for whatever purpose.

MS. GILLETTE: I'm sorry?

THE COURT: I said for whatever purposes notice is waived.

MS. GILLETTE: Okay. Thank you.

(WHEREUPON, THE HEARING CONCLUDED.)

PROOF OF SERVICE

I, Margot Crosman , am a citizen of the United States and am over the age of 18 years and am not a party to the within action. My address is : 152 Vicksburg, San Francisco, CA 94114. I served the within PETITION FOR WRIT OF CERTIORARI on Respondents in the action by placing true copies thereof in sealed envelopes with first-class postage pre-paid and addressed to:

Eldora A. Gardner,
Associate Counsel,
P.O. Box 37000,
555 California St., 8th Floor,
San Francisco,
CA 94137.

The Clerk, Department 9,
California Superior Court,
City Hall,
San Francisco,
CA 94102.

The Clerk, re case # 1 Civ 53133,
California Supreme Court,
350 McAllister,
San Francisco,
CA 94102.

on November 28, 1981 .

I declare under penalty of perjury that the foregoing is correct and true.

SIGNED Margot Crosman DATED 11/28/81